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Supreme Court of the United States

October Term, 1955.

No. 529

MARIE DESYLVA

Petitioner.

vs.

MARIE BALLENTINE, as Guardian of the Estate of
STEPHEN WILLIAM BALLENTINE,

Respondent.

On Petition for Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

BRIEF OF COUNSELORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MARIE DESYLVA
COURT OF APPEALS
LEON F. LEVINE
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On Petition for Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

Questions Presented.

1. Does a surviving spouse of a deceased author have the sole right to the renewal rights granted by the Copyright Act, which accrued after the author's death, to the exclusion of the children of the author?
2. Is an illegitimate child excluded from all rights granted by the Copyright Act with respect to renewal privileges?

Statutes Involved.

The pertinent portion of Title 17, U. S. C., Section 24, providing for the renewal of copyrights reads as follows:

"Duration: Renewal and Extension:

"The copyright secured by this title shall endure for twenty-eight years * * * *And provided further*, That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: * * *."

Respondent respectfully calls this Court's attention to the omission by Petitioner in her printing of an excerpt from the above statute (page 3 of Petition for Certiorari) of the word "widower" from the phrase "widow, widower or children" as contained therein. The omitted word provides additional clarification in the interpretation of this statute.

Reasons for Denying the Petition.

It is well established that the right involved in this case (to wit, the renewal right which first accrues upon the expiration of the copyright period) is a new creation of the Copyright Act, and exists only by virtue of the privilege granted by Congress directly to certain classes of persons; the original copyright and its ownership dies upon expiration of the term of the copyright; the renewal

right is a new estate clear of all rights, interests or licenses granted under the original copyright. (*G. Ricordi & Co. v. Paramount Pictures* (1951), C. A. N. Y., 189 F. 2d 469, cert. den. 342 U. S. 849, 72 S. Ct. 77.) The right of renewal is not dependent upon or fixed by the law of descent; it never goes into the estate of the decedent as property. If the author is living at the time the renewal right accrues, he is solely entitled to that right; if he is dead at that time, the renewal right goes directly by virtue of the grant in the Act, and not by inheritance, to the groups of persons enumerated in the statute. (See, *Silverman v. Sunrise Pictures Corp.* (1921), 2d Cir., 273 Fed. 909, 911.) When one of a group entitled to renew obtains the renewal for himself, he does so for the benefit of and in trust for the entire group. (See, *Tobani v. Carl Fischer, Inc.* (1938), 2d Cir., 98 F. 2d 57, cert. den. 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420 (one of the deceased author's children renewed and the renewal was held to be for the benefit of and on behalf of all of the children); *Silverman v. Sunrise Pictures Corp.*, *supra* (renewal by two of the next of kin held to be a renewal for the benefit of and in trust for all next of kin who were members of the class)).

No reason is advanced why this cause should be reviewed by this Court.

(a) There Is No Conflict With the Decision of Another Court of Appeals on the Same Matter.

The opinion of the Court of Appeals is not in conflict with the case of *Silverman v. Sunrise Pictures Corp.*, *supra*. The opinion specifically analyzes that case and points out that the phrase "order of enumeration" as used in that case (as well as by a number of commentators) in-

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dicates an enumeration by classes; the widow would not be preferred to the exclusion of the child, both being treated by Congress as a class specified in the second enumeration, and both being properly expectant of the author's bounty.

(b) **The Court of Appeals Has Not Decided a Federal Question in a Manner in Conflict With Any Applicable Decision of This Court.**

McCool v. Smith (1861), 66 U. S. 218, 1 Black 459, considered the inheritance of real property, and is not applicable to the issues here involved which concern a grant of renewal rights by the Copyright Act directly to the groups named, and not with the matter of inheritance. The opinion of the Court of Appeals treats of the *McCool* case, and points out its inapplicability to the issues here involved. See, also, *Hutchinson Investment Co. v. Caldwell* (1894), 152 U. S. 65, 68, 69, cited by the Court of Appeals.

(c) **No Important Federal Question Is Raised Which Requires Settlement by This Court.**

This is the first instance since the present statutory language was adopted (in 1909) that the particular issue involved has arisen and, as the opinion of the Court of Appeals stated and as the petitioner then conceded, there were no cases determining the respective claims between widows and children, respecting copyrights.

All that is involved in this case on the issue of the priority of renewal rights is the interpretation of the above-set-forth portion of the Copyright Act as between the widow and child, which particular clause is clear in its meaning, and has a limited application. The issue only arises in the event the renewal right accrues after the

death of the author and, then, only in the event of a dispute between the surviving spouse and children. In the instant case, a further factor was injected by the fact that the mother of the child and the deceased were never married, so that the dispute became one between the widow of the deceased author and his only child, an acknowledged illegitimate son. The treatment of the issues in the opinion of the Court of Appeals presents nothing requiring the further treatment of those issues by this Court.

(d) The Fact That the Court of Appeals Did Not Venture an Opinion on Extraneous Matters Not Before It Is No Reason for This Court to Grant Certiorari.

The Court of Appeals disposed of the issues between the parties before it. It had no occasion or reason to discourse upon what the rights of other parties might be had they been before the Court, such as in a situation that would have been presented had the minor not been the only child of the deceased author.

(e) The Decision of the Court of Appeals Is Clearly a Correct Interpretation of the Intelligible and Plain Language of the Statute; Is Also in Accordance With the Recognized Purpose of the Act to Protect Both the Widow and Children of the Deceased Author; and Is Also in Accordance With the Practice and Views of the Copyright Office.

The renewal provision in question is designed to protect the widow, widower and children against situations theretofore existing wherein authors, who died prior to the accrual of renewal rights, had previously disposed of those rights (often prior to the establishment of their true value, and for a mere fraction of such true value), leaving wives and children without sufficient protection. By the terms

of the statute, an author who dies before renewal rights accrue cannot dispose of those rights in disregard of the interests of the widow (or widower), or children, or both, by deed, will, or otherwise.

If the author survives the original period of copyright and renews the copyright during his lifetime, then the remaining classes of persons enumerated in the statute do not acquire any interest in the renewed copyright. Similarly, if the author is dead and the first class enumerated in the statute renews, then the members of the succeeding class enumerated in the statute have no interest in the renewed copyright. Accordingly, if petitioner's interpretation of the statute were adopted, the surviving spouse would be in one class and the children of the author would be in a succeeding class, with the result that when the surviving spouse renews the copyright, such renewal would be to the complete exclusion of the children for all times. Thus, if petitioner prevailed in the instant cause, the child would be excluded in all participation in the copyrights renewed by her, even though her death immediately followed such renewal.

The fact that certain commercial interests might find it easier to deal with copyrights if the protection granted by the statute were eliminated or modified does not present persuasive reason for disregarding the language and purpose of Congress, and divesting children of the rights and protection granted to them by the statute. Usually a number of persons own a single copyright together, whether by reason of co-authorship, or otherwise, and the industry has always functioned accordingly. In any event, these are matters which should be addressed to the attention of Congress, and do not present a ground for review by this Court.

(f) The Alleged Failure to Exhaust Administrative Remedies Presents No Ground for a Review of This Cause by This Court.

(1) The alleged issue is not a question of jurisdiction, was never before raised by either party or passed upon by the District Court, or by the majority opinion in the Court of Appeals and, in any event, presents no ground for granting certiorari, as set forth in Rule 19 of the Rules of this Court.

(2) The petitioner has never before raised this issue and has, in fact, waived it. The judgment granted by the District Court was in favor of petitioner in response to petitioner's motion, and was prayed for by petitioner in her pleading filed in the District Court. In petitioner's Opening Brief (p. 2) on her cross-appeal to the Court of Appeals from the decision of the District Court, petitioner sets forth and affirms the basis for the jurisdiction of the District Court. In her present petition (p. 5) petitioner also states the basis for jurisdiction of the District Court.

(3) There were no administrative remedies to be exhausted. The contention of petitioner in this respect arises from a misconception of the nature of a registration of copyright, and of the function of the Copyright Office (as distinguished from the Patent Office). A statutory copyright runs in favor only of a *person entitled thereto* (regardless of who attempts registration), and is effected by the *publication* of the work with notice, which act takes place before the registration. The registration is not a grant of a copyright; it is merely a registration of a *claim* to a copyright; it is a technical requirement which must be met before suit is brought on the copyright. The registration certificate provides merely *prima facie* evi-

dence as to its contents and does not relieve the claimant of the burden of proof as to his rights. (*Saake v. Lederer* (1909, Pa.), 124 Fed. 135, 98 C. C. A. 571; 17 U. S. C., Secs. 1, 10, 11, 12.) The Copyright Office does not make the determination that the registrant is the person entitled to the copyright. Neither judicial functions nor discretion are conferred upon the Copyright Office in this respect, nor does the Copyright Office presume to exercise such function or discretion. (Rules of the Copyright Office, 17 C. F. R., Secs. 201.2(a), 202. Committee Report (No. 2222) on Bill Enacting Copyright Act of 1909, Sec. 53, 60th Congress, 2d Session Report No. 2222 to Accompany H. R. 28192.) In this respect, the Copyright Office does not function like the Patent Office. The Copyright Office, in fact, registers conflicting claims. [See, letter of George D. Cary, legal advisor to Copyright Office, Rep. Tr. pp. 8-10.]

(4) Since a renewal by one of a class entitled to renew is for the benefit of all, there is no necessity or purpose for all to file separate renewal registrations in order to determine or preserve their rights among themselves, or in order to determine whether they are indeed members of the class. One may have a claim or right arising under the Copyright Act without having himself filed the claim to copyright or the renewal thereof. In this case, it was duly alleged that the renewals in question had been made and that they were made by petitioner, on behalf of the minor. The claim of the minor was not merely as to his right to register a renewal, but also that renewals made pursuant to the Copyright Act had been made on his behalf.

(5) The determination of rights in this action is final and settles the issues passed upon, so far as the parties

are concerned. No further registrations or renewals will be necessary with respect to the renewals already accomplished.

(6) Declaratory relief may be a proper remedy before as well as after application for renewal is made. (See *Carmichael v. Mills Music, Inc.*, (D. Ct., S. D. N. Y., 1954), 121 Fed. Supp. 43.)

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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